IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-6431

ABDIEL CABAN,

Appellant,

—against—

KAZIM MOHAMMID and MARIA MOHAMMID,

Appellees.

APPEAL FROM THE JUDGMENT AND ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC.

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MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE

Community Action for Legal Services, Inc. ("CALS") respectfully moves this Court pursuant to Supreme Court Rule 42(3) for leave to file the attached brief as amicus curiae.

The attorneys for all the parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Appellant and Appellees have granted their consent.*

Community Action for Legal Services is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to

*The letter(s) of consent have been filed with the Clerk of this Court. However, as of this moment the Assistant Attorney General on this case is away from his office and it has not been possible to reach him in order to request his consent.

the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal service to indigent New York City residents who cannot afford to pay a private attorney. Representation is provided in such diverse areas as housing law, the law of public assistance and other government benefits, consumer law, employment law, family, juvenile and education law. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all the trial courts of New York City, in the State and Federal Appellate Courts and in this Court.

Approximately 20% of the cases handled

by CALS' neighborhood legal services offices is in the area of family law. The case include matters of divorce, separation, child custody, visitation and support, child protective proceedings, foster care review proceedings, paternity proceedings, guardianship proceedings, proceedings for termination of parental rights and adoption proceedings. Many of CALS clients are fathers of children born out of wedlock. Such fathers regularly seek legal assistance in order to have their name listed on their child's birth certificate, to assert claims for visitation with or custody of their children, as respondents or petitioners in paternity and support proceedings, and as respondents in adoption and other proceedings for termination of parental rights. On the basis of their experience CALS attorneys have extensive knowledge

of the living patterns of poor families and the social and legal problems that confront them in their familial relationships.

Based upon its' experience, Amicus has maintained that family members, whether mothers, fathers, or children should not be discriminated against and penalized in their familial relationships solely on the basis of out of wedlock status or illegitimacy.

The nature of the right of an unmarried father to oppose the adoption of his children is obviously of great importance to the many unwed fathers who are CALS clients: Many are presently facing the loss of their children under substantially similar circumstances as those which faced Appellant Caban.

Accordingly, Amicus wishes to submit its brief because of its concern about the impact of this case on its clients and hopefully to

present to the Court an analysis of the issues which may not otherwise be presented.

Wherefore, Community Action for Legal Services request leave to file the attached brief amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case comes to this Court by way of appeal pursuant to 28 U.S.C. §1275(2) from a judgment of the New York Court of Appeals, entered on November 17, 1977 and from two subsequent judgments and orders of said Court of Appeals, entered on January 10, 1978 and February 14, 1978 respectively. The last two judgments denied a motion for re-hearing and reargument of that Court's initial, November 17, 1977 judgment. By its judgment, reported as Matter of David A.C., 43 N.Y. 2d 708, 401 N.Y.S. 2d 208 (1977), the New York Court of Appeals dismissed as insubstantial an appeal

from an order of the Appellate Division of the Supreme Court of the State of New York, Second Department. The order of the Appellate Division reported as Matter of David Andrew C., 56 A.D. 2d 627, 391 N.Y.S. 2d 846 (1977), had affirmed the order of the Surrogates Court of the State of New York for Kings County which, on or about September 10, 1976,over the objections of Appellant Abdiel Caban, approved the adoption of his two children David and Denise by the Appellees, Kazim Mohammed and his wife Maria Mohammed, and simultaneously disapproved their adoption by Appellant Abdiel Caban and his wife Nina Caban.

Appellant Abdiel Caban is the unwed father of the children David and Denise.

Appellee Maria Mohammed, their mother bore his children out of wedlock. When the Surrogate's Court, Kings County approved the adoption of the children each parent was legally married to a new partner. Appellant Abdiel Caban had married one Nina Caban . Appellee Maria Mohammed had married Appellee Kazim Mohammed. In approving the adoption of the children by their mother and her new husband Kazim Mohammed and denying their adoption by appellant, their father, and his new wife, the Surrogate's Court relied on the provision of New York Domestic Relations Law §111,* Subdivision 3

*All references are to the statute as it existed prior to January 1, 1977. 14 McKinneys Consolidated Laws of New York, Annotated, copyright 1964, Cumulative Annual Pocket Part for use in 1976 - 1977, p. 51-52; McKinney's 1975 Session Laws of New York, Chapter 704, §3, p. 1117).

and on the interpretation of that statute by the New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y. 2d 568, 370 N.Y.S. 2d 511 (1975) appeal dismissed sub nom Orsini v. Blasi, 423 U.S. 1042, 46 L. Ed 2d 643 (1976).

Domestic Relations Law §111 prescribes whose consent is required before a child may be adopted. Domestic Relations Law §111, Subdivision 2 provides that in the case of a child born in wedlock the consent of the child's parents or surviving parent is required. However, the required parental consent may be dispensed with on the grounds of abandonment and other species of parental unfitness defined by Domestic Relations Law §111, Subdivision 4. In the case of a child born out of wedlock only the consent of the mother is required by Domestic Relations Law §111, Subdivision 3. Malpica-Orsini supra had held that the rights of an unwed father were appropriately

protected under the Fourteenth Amendment of the Constitution if he was given notice of his children's proposed adoption and an opportunity to be heard with respect to the children's "best interest."* The entry of an order of filiation pursuant to Article 5 of the Family Court Act does not affect an unwed father's legal position with relation to the adoption of his children pursuant to Domestic Relations Law §111, Subdivision 3: The father in Malpica-Orsini had had his paternity legally determined.

The following essential facts seem undisputed. Appellant Abdiel Caban and Appellee Maria Mohammed lived together unmarried for five years - from 1968 through 1973. Their two children David and Denise were born during this time (David was born in 1969, Denise in 1971). Appellant Caban's name appeared on the children's birth

*This requirement was subsequently codified by Domestic Relations Law §111-a.

certificate and the children bore his name. Appellee Maria Mohammed then used the name Caban and held herself out to be Appellant's wife. Neither she nor the Appellant ever sought a legal declaration of Appellant's paternity. However, in the adoption proceeding below the Surrogate's Court in its opinion and orders accepted him as the father of the children.

Until at least the end of 1973 Appellant Abdiel Caban and Appellee Maria Mohammed jointly provided a home and supported and raised their children. The Surrogate found that both had worked and both had contributed to the support of the children. (A-28). Early in 1974 Appellee Maria Mohammed, of her own choice, left Appellant Caban. Apparently, without warning she moved out of their apartment and took the children with her. She married Appellee Kazim

Mohammed in January 1974, but the fact of the marriage and her whereabouts were not known to Appellant until 1975. Despite the separation, Appellant Caban continued his relationship with his children; until September 1974 he saw the children and spent time with them every weekend.

In September, 1974 Appellee Maria Mohammed sent the children to Puerto Rico, where they lived with her mother and also visited and sometimes stayed with their paternal grandparents, the Cabans. In November, 1975, Appellant Caban went to Puerto Rico to visit his children and brought them back to New York City. He had married in the interim and wanted to care for the children in his home. The children lived with Appellant Caban until January 1976. During that month, Appellee Maria Mohammed commenced a custody proceeding against Appellant Caban. Custody of the children pendente lite was granted to the Appellee

mother, with visitation to the Appellant father. However, the custody proceeding was never tried, for it was rendered moot by the intervening adoption proceeding which is the subject of this appeal. Notice of the adoption proceeding was issued in February, 1976. Until September 1976, when the adoption order terminating his parental rights was entered, Appellant Caban continued to see his children at his home every week. With the entry of adoption order, Appellant Caban's relationship to his children came to an abrupt and complete stop.

In granting the adoption the Surrogate found neither that Appellant Caban had abandoned his children nor that he was not fit to be their father on any of the other grounds for dispensing with required parental consent to an adoption, spelled out by Domestic Relations Law §111, Subdivision 4. Moreover, the opinion of the Surrogate makes clear that in approving the adoption he gave no consideration what-

soever to Appellant Caban's fitness or unfitness as a father.

Acting in accordance with New York statutory authority and case law, the Surrogate Court below noted on the one hand that without the consent of the natural mother, the putative father has "no prospect of adopting the child" and on the other hand that the primary objective of allowing a putative father to be heard in opposition to the adoption by a step-father married to the natural mother

> "is not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may have concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant."
> (Opinion, Surrogate Sobel dated August 3, 1976, (Appellant's Appendix p. 28).*

*Hereinafter designated as "A"

As to the feelings of the children themselves, the Surrogate found that "the children are not old enough to be articulate; the oldest is able however to express "love" for both his fathers" (A-29).

It is clear that the Surrogate evaluated the best interest of Appellant Caban's children solely in terms of the fitness of Appellees and gave no consideration to the character of Appellant Caban or the relationship between him and his children. Thus the Surrogate concluded

> "There is absolutely no evidence, credible or otherwise, that the new marriage of the natural mother is other than solid or permanent; and no evidence whatsoever that the children are not well cared for and healthy. Nothing therefore justifies a denial of the petition other than that the putative father professes that he loves the children and fervently desires that they continue to bear his name. This is not enough, however sincerely motivated." (A-30).

Appellant Abdiel Caban argued before the Surrogate's Court and on subsequent appeals that adoption of his children without his consent solely on the basis of their mother's consent and consideration of "the best interest of the child" and automatic disapproval of his and his wife's application for adoption on the basis of the mother's veto denied him due process and equal protection of the laws under the Fourteenth Amendment. Probable jurisdiction was noted by this Court on May 15, 1978.

QUESTIONS PRESENTED

1. Whether New York Domestic Relations Law §111, (McKinney 1976) on its face and as applied violates the Due Process Clause of the Fourteenth Amendment in that it permits the adoption of children without requiring the consent of their unwed father without regard to his fitness but solely on the basis of a finding that the adoption is

"in the best interest of the child. "

2. Whether New York's Domestic Relations Law §111, (McKinneys 1976) on its face as applied violates the equal protection clause of the Fourteenth Amendment in that it permits the adoption of children without the consent of their unwed father but prohibits adoption of children without the consent of their married /divorced father or unwed mother.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is estimated that a third or more of children now growing up in America will at some point find their parents separating.* In over ninety percent of these instances, if present practice continues, their custody will be entrusted to their mothers.** The

*Bane, Mary Jo, Here to Stay: American Families in the Twentieth Century, New York Basic Books 1976)

**See People ex rel Watts v. Watts, __Misc. __ 2d, 350 N.Y.S. 2d 285 (1973).

role and rights of fathers separated from their children as a result of family breakup has been the subject of growing concern and comment as fathers find themselves pushed out of their children's lives. The problem of a continued relationship with their children confronts fathers whether or not the family unit of which they once were a part was the product of a legal marriage. This case calls into question the legal basis whereby the rights of an unmarried father to a relationship with his children may be abrogated and conferred in his stead on the man whom the children's mother subsequently chooses to marry.

This Court has properly recognized that the interest of an unwed father in

the children whom he has "sired and raised" Stanley v. Illinois, 405 U.S. 645, 651 (1972) is included among the fundamental familial rights protected under the First, Ninth and Fourteenth Amendments of the Constitution. The provisions and application of Domestic Relations Law §111 to permit the adoption of Appellant's children without his consent and without relationships to his functioning as a parent, solely on the basis of the consent of the children's mother and a finding that adoption by their stepfather was in their best interest, impermissibly deprived Appellant Caban of his substantive Due Process right to a relationship with his children.

New York has no compelling or important interest in severing the familial relationship between an unwed father and his children without regard to the father's

character and fitness as a parent and without considering whether his relationship to his children is harmful to them. The description of New York's interest in Matter of Malpica-Orsini, 36 N.Y. 2d 568, 370 N.Y.S. 2d 511 (1975) appeal dismissed sub nom Orsini v. Blasi, 423 U.S. 1042, 46 L. Ed 2d 643 (1976) is related primarily to administrative convenience, and a stereotypic portrayal of unwed fathers based on generalized speculation. New York has no interest in fostering adoption for its own sake for children who are not homeless and have meaningful ties to their unwed fathers. The "best interest of the child standard," the only standard considered in connection with the adoption of an unwed father's children, by its nature permits considerations of parental fitness and harm to children to be ignored. The "best interest of the child"

standard is vague, subjective, incapable of providing notice of the consequences of particular conduct and subject to arbitrary application. For all those reasons it is an impermissible standard for the termination of an unwed father's parental rights. Provisions such as those of Domestic Relations Law §111, Subdivision 4 can satisfy the State's interest in severing a destructive parent child relationship.

The permanent severance of the parent-child relationship for "slight" reasons also deprives children of a meaningful and important relationship with their father. The meaning and importance and the relationship persists even though the children and their father are living apart.

The disparate treatment of unwed fathers as opposed to married fathers and unwed mothers pursuant to New York Domestic Relations Law §111 also denies Appellant

Caban the equal protection of the laws. This discrimination on the basis of sex and illegitimacy without "relationship to individual responsibility" Frontiero v. Richardson, 411 U.S. 677, 686 (1973) permits children to be adopted or not adopted on an arbitrary basis.

POINT I

THE ADOPTION OF APPELLANT'S CHILDREN PURSUANT TO NEW YORK DOMESTIC RELATIONS LAW §111, ON ITS FACE AND AS APPLIED DENIED HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

Appellant Caban's status as father and relationship to his children David and Denise, whom he had "sired and raised" Stanley v. Illinois, 405 U.S. 645, 651 (1972) was permanently terminated when the Surrogates Court, Kings County, approved the children's adoption by their mother's new husband Kazim Mohammed. As a result

of the adoption all contact between Appellant and his children came to an end. In the Matter of Gerald G.G. __Misc. 2d__, __N.Y.S. 2d__ (1978).* The adoption of his children was approved without their father's consent because he fathered his children out of wedlock. Because of this fact, pursuant to state statute, his consent to the adoption of his children was not required, and the adoption could be opposed only pursuant to the state law standard of "the best interest of the child." As interpreted by the Surrogate below in this case, as well as in other New York decisions, Matter of Malpica-Orsini, supra, Matter of Gerald G.G., supra,a putative father's relationship to his children may be forever ended without any showing that the father is seriously disqualified from parenthood or that the children will suffer significant harm as a result of their continued relationship to him.

*New York Law Journal, April 28, 1978, p. 10

The opinion of the Surrogate shows (A 27-30) that Appellant's character and relationship to his children were treated as irrelevant to the adoption decision, which rested instead on the Court's approval of Appellee's marriage and finding that the children were well cared for by their mother and her new husband.

NATURE OF APPELLANT'S INTEREST

By the Surrogate's adoption order the State of New York deprived Appellant Caban of a fundamental liberty recognized by this Court as protected by the First, Ninth and Fourteenth Amendments. E.G. Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); May v. Anderson, 345 U.S. 528 (1953), Armstrong v. Manzo, 390 U.S. 545 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Moore v. East Cleveland, 431 U.S. 494 (1977).

In Stanley v. Illinois, supra the Court admitted the relationship of an unwed father and his children to that "private realm of family life which the state cannot enter", Prince v. Massachusetts, 321U.S. 158, 166, holding that "the private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection." Stanley v. Illinois, supra at 651.

Since then this Court has repeatedly noted that the legal status of families was not controlling in the assessment of familial rights under the Constitution, Smith v. Organization of Foster Families, 431 U.S. 816, fn 53 (1977) Quilloin v. Walcott, __U.S.__, 54 L. Ed., 2d 511 (1978). See also Rothstein v. Lutheran Social Services of Wisconsin, 405 U.S. 1051 (1972).

Amicus believes that the permanent severance of the parent-child relationship between Appellant Caban and his children without his consent under the standard utilized by the Surrogate's Court - the best interest of the child - is not consistent with their substantive due process right to their familial relationship, a right which this Court has stated

> "has its source not in state law, but in intrinsic human rights, as they have been understood in this nation's history and tradition." Smith v. Organization of Foster Families, 431 U.S. 816, (1977).

The termination of the parental relationships of the unwed father through the adoption of children is no less painful or significant a loss because prior to the adoption the children were not in the father's custody. This Court has recognized the value of the parent-child

relationship as "far more serious than property rights" in cases where parent and child had not been living together. May v. Anderson, 345 U.S. 528, 533 (1953); Armstrong v. Manzo, 390 U.S. 545 (1965). It would be too narrow and literal and impoverished an approach to human and familial relationships to suggest that the love, identification and concern of a father for his children can have sufficient value and meaning to merit constitutional deference only if father and children reside under the same roof.

Amicus believes that the severance of Appellant Caban's parental relationship to his children without his consent based solely on a finding that it is in the children's best interest, is not justified by any compelling or powerful state interest and that such interests as the state legitimately

possesses could be accomplished by less drastic means. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639, 647 (1974); Roe v. Wade, 410 U.S. 113 (1973); Moore v. East Cleveland, 431 U.S. 494 (1977).

INSUFFICIENCY OF STATE INTEREST

The purported interests of the State of New York in permitting the adoption of illegitimate children "in their best interest," but without their father's consent and without any showing that he is otherwise disqualified for parenthood were identified by the New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y.S. 2d 568, 370 N.Y.S. 2d 511 (1975). This was the decision relied on by the Court of Appeals in leaving the adoption of Appellant Caban's children undisturbed, Matter of David A.C., 43 N.Y. 2d 708, 401 N.Y.S. 2d 208 (1977).

The majority's analysis of state interest in Malpica-Orsini is striking in several respects: The discussion of state interest is

completely unrelated to the legal and human situation involved in that case, and, even more clearly presented by this case. The Court of Appeals considered New York's concern for the adoption of homeless foster children as a justification for curtailing the rights of unwed fathers whose children not only are not homeless, but, as in this case, have two suitable homes beckoning. Further, the Malpica-Orsini decision is written to suggest that if an unwed father's consent to the adoption of his children were required, any such father no matter how unconcerned, cruel and irresponsible would have absolute power to prevent the children's adoption.

It is not disputed that New York State has a legitimate interest in the welfare of children in general and of homeless foster children in particular. However, requiring the consent of unwed fathers to the adoption of their children will not jeopardize those interests. The Court of Appeals' assumptions about the effect of such a requirement on

the adoption of foster children are highly questionable.

The Court of Appeals,for example, was concerned with the difficulties of locating putative fathers,if their consent to an adoption were required. But, since the Court of Appeals acknowledged that the putative father must be given notice of the proposed adoption, the consent requirement would not make any difference. The requirement of notice,including notice of the consequences of failure to appear, now codified in Dom.Rel.Law &111-a and Soc.Serv.Law§384-c means that the effort to locate the father must be made in any event.*

*For a helpful discussion of the manner in which several states have dealt with the notice problem see Freeman, Remodelling Adoption Statutes after Stanley v. Illinois, Journal of Family Law, Volume 15,No.3,p.385. University of Louisville School of Law 1976-1977.Interestingly,a recent study of paternity and support proceedings in the N.Y. City Family Court found that most putative fathers readily acknowledged paternity and their support obligations. Who Should Support Children, Community Council of Greater New York,225 Park Avenue South, New York,NY10013 pp.64-65.

Further, as pointed out by Zent, Edmonds, Buttrey, Kaufman, in New York Civil Practice, Family Court Proceedings, Matthew Bender, New York 1976. Vol. 12B §40.2

> "Where the person whose consent would otherwise be required does not appear, or if he appears and contests, the issue then becomes whether he falls into one of the categories enabling the court to dispense with his consent.

The Court of Appeals was also concerned that putative fathers of foster children would harrass adoptive parents. But it is not clear why it is the unwed fathers who is especially likely to harrass. The New York State legislature is apparently unconcerned with the risk of harrassment, since it permits parents and foster parents to meet and know one another's identity in foster care review and custody proceedings, Social Services Law §383(3), §392, extension of placement proceedings, Family Court Act §1055 and in some instances

in proceedings for termination of parental rights, Social Services Law §384-b.3(a) and (b). Further New York Courts can deal with problems of harrassment, when they occur, by curtailing visitation - less drastic means than final termination of the parent-child relationship. De Biase v. Scheinberg, 47 A.D. 2d 657, 364 N.Y.S. 2d 34 (1975); Herb v. Herb, 8 A.D. 2d 419, 188 N.Y.S. 2d 41. Similarly, in its discussion of delays which the need for the consent of unwed fathers would create in the adoption process, the Court of Appeals never mentioned that there is a six months waiting period for the approval of adoption in New York Domestic Relations Law § 112(6).

The New York Court's speculation that requiring an unwed father's consent to the adoption of his child will lead to an increase in black market adoptions, like the question of harrassment, reveals the unyielding social prejudice which permeates

the Malpica-Orsini opinion. There is no factual basis for it.

The negative image of the unwed father in Malpica-Orsini bears no resemblance to the responsible and concerned unwed father in this case and in the many reported New York decisions involving unwed fathers and their children. E.G. Application of Virginia Norman, __Misc. 2d__, 205 N.Y.S. 2d 260, (1960); Loretta Z. v. Clinton A., 36 A.D. 2d 995, 320 N.Y.S. 2d 997; (1971); Raysor v. Gabbey, 57 A.D. 2d 437, 395 N.Y.S. 2d 290 (1977); Stone v. Chip, 68 Misc. 2d 134; 326 N.Y.S. 2d 520 (1971); Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S. 2d 636 (1966); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S. 2d 318 (1967); Pierce v. Yerkovich, 80 Misc. 2d 613, 363 N.Y.S. 2d 403 (1974); Boatright v. Otero, __Misc. 2d__ 339 N.Y.S. 2d 391 (1977); Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S. 2d 792 (1968). People ex rel Blake v. Charger 76 Misc. 2d 577, 351 N.Y.S. 2d 322.

In its assessment of unmarried fathers, the Court of Appeals adopted the same "Procedure by presumption" which was rejected by this Court in Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Most important, in analyzing New York's interest in facilitating the adoption of foster children, the Court of Appeals in Malpica-Orsini, failed to acknowledge that proceedings for termination of parental rights exist to permit the adoption of foster children despite lack of consent from their parents, pursuant to S.S.L. §384-b.* Similarly, in private adoptions, Domestic Relations Law §111, Subdivision 4 provides grounds for dispensing with require parental consents to adoption. These statutes

*At the time of Malpica-Orsini predecessor statutes, Social Services Law §384 and Family Court Act, Article 6, Part 1, governed involuntary termination of parental rights.

provide bases for severing the parent-child relationship in cases of serious parental failure and serve the State's child protection interest.

In the case of foster children, grounds for termination of parental rights include abandonment, infrequent visitation, severe and incurable mental illness or retardation, as well as parental failure to make and attempt to carry out plans for the future discharge of the children from foster care. See S.S.L. §384-b.4,5,6 and 7. These recently revised provisions are powerful weapons the State of New York has developed in the interest of homeless foster children. See Matter of Orlando F., 40 N.Y. 2d 103, 396 N.Y.S. 2d 64 (1976); Matter of Bradley U., 55 A.D. 2d 722, 389 N.Y.S. 2d 431 (1976); Matter of Anthony L "CC", 48 A.D. 2d 415, 370 N.Y.S. 2d 219 (1975). Given the ability of the State of New York pursuant to statutory proceedings to terminate the parental rights

of uncaring, irresponsible or severely incapacitated parents of children in foster care, thus making the children available for adoption, there is no reasonable relationship between New York's legitimate interest in facilitating the adoption of homeless foster children and the indiscriminate disregard of the rights of unwed fathers expressed by Domestic Relations Law §111, Subdivision 3 and Malpica-Orsini, supra.

While New York's interest in finding permanent homes for homeless foster children is self-evident, the nature of New York's interest in facilitating adoption of illegitimate children by step-fathers, regardless of the fitness of the children's own fathers, is far from clear.

The Court of Appeals in Malpica-Orsini mentioned only two factors: One, was that difficulty in adoption of step children would discourage marriages. Like so much in the Malpica-Orsini case this argument is

based entirely on conjecture. Nor is there any showing that stepfather adoption will contribute to the stability of a marriage. More serious is the argument that step father adoption frees illegitimate children of "the cruel and undeserved out of wedlock stigma." 36 N.Y. 2d 572. Yet, the stigma of illegitimacy seems largely to be a thing of the past." "The notion that marriage and marital ties are essential to parenthood is on the decline . . . " Betty Yorburg, The Changing Family, Columbia University Press, 1973, p. 114. Not only has cohabitation without marriage become more respectable, but the high divorce and remarriage rates* mean that there are many children whose last name may be different from that of their remarried mother. Thus, children born out of wedlock do not have any special identifying characteristics. There was nothing about

*Bane, Here to Stay: American Families in the Twentieth Century pp. 29-34, Basic Books, 1976.

the Caban children's birth certificate that would reveal that they were illegitimate. See New York Public Health Law §4135. New York State's interest in the protection of children does not require that the interests of unwed fathers be slighted. Where an unwed father abandons his children or where his relationship to them is destructive, Domestic Relations Law §111, Subdivision 4 can be applied to dispense with his consent to a step father adoption as it is in the case of married fathers.*

*Domestic Relations Law §111, Subdivision 4 authorizes dispensing with the adoption consent of a parent who has abandoned a child, who has been deprived of civil rights. See Matter of Holly S.S. v. John S.S. 57 A.D. 2d 681, 393 N.Y.S. 2d 821 (1977); Matter of Carey L. v. Martin L., 55 A.D. 2d 717, 399 N.Y.S. 2d 428; In the Matter of Anonymous, 79 Misc. 2d 290, 359 N.Y.S. 2d 738 (1974).

New York may not prefer the state created status of adoption merely for its own sake, over constitutionally protected familial interests. New York already provides the unwed father with notice of the proposed adoption, and, if the father appears, with a hearing. New York's claims of administrative inconvenience and Appellees, no doubt short sighted, desire to have Appellant Caban out of their lives does not justify New York in providing Appellant unwed father with an "empty" hearing instead of a meaningful one.

Amicus submits that New York's interest in automatically dispensing with the consent of an unwed father to the adoption of his children is de minimis.

INSUFFICIENCY OF BEST INTEREST OF THE CHILD STANDARD

Both in Smith v. Organization of Foster Families, 431 U.S. 816 (1977) and in Quilloin v. Walcott, __U.S.__ 54 L. Ed 2d 511 (1978)

this Court suggested that abridgement of parental rights solely because it was "in the best interest of the child" and without a showing of parental unfitness would offend the Due Process Clause.

As this Court noted in Smith v. O.F.F.E.R., 431 U.S. 816, fn 36 (1977) "the best interest of the child" standard is vague. Lacking any defined meaning this standard gives no notice of the conduct, if any, that may lead to the adoption of children over their unwed fathers objections; nor does it provide a basis for fair and uniform application by judges. Further, there is no such thing as weight of evidence when "the best interest of the child" standard is applied. "Best interest of the child" has been subject to severe criticism by legal scholars. The standard has been described as inherently indeterminate.

> "The indeterminancy flows from our inability to predict accurately human behaviour and from a lack of a social consensus as to the values that should inform the

decision. Mnookin, Child Custody Adjudication, 39 Law & Contemporary Problems 226 at 264 (1975).

Prof. Mnookin found that the best interest standard allows judges to rely on personal values, left considerable scope for class bias and creates the unfair risk of retroactive application of a norm of which the parent will have had no notice. The best interest standard leads to arbitrariness in that:

> "The same case presented to different judges may easily result in different decisions. The use of an indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed." Id. at 263. See also Wald, State Intervention on Behalf of 'Neglected' Children, 28 Stanford Law Review. No. 4, p. 623 (April 1976) at 649.*

*A comparison of the Surrogate's opinion in this case with the opinion of the Appellate Division Second Department in Matter of Gerald G.G. N.Y. L.J. 4/28/78, p. 10 where opposite results were reached on similar facts illustrates the arbitrariness of the best interest test. In both cases father and mother had lived and cared for their children together and in both cases the father continued to maintain an active interest in the children after father and mother had separated. If anything Appellant Caban's relationship to his children was closer.

The best interest of the child standard also is constitutionally defective because it permits abridgement of fundamental parental rights without a showing of parental unfitness and consequent serious harm to the children. Absent such a showing the state may not abridge let alone permanently destroy a parent-child relationship. Meyer v. Nebraska, 262 U.S. 390 (1923); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972). A number of lower Federal Courts have invalidated state statutes abridging familial rights because of the vagueness and inappropriateness of the standard used. Alsager v. District Court of Polk County Iowa 406 F. Supp. 10 (Iowa 1975) aff'd 545 F. 2d 1137 (8th Cir. 1976); Roe v. Conn., 417 F. Supp. p. 769 (Md. Ala 1976); Sims v. Texas Department of Public Welfare, 438 F. Supp. 1179 (Ed. D. Tex. 1977). In Roe v. Conn., the three judge Federal District Court stated:

> "Due process requires the state to clearly identify and define the evil

from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship".417F.Supp.780

ADOPTION AND THE INTERESTS OF CHILDREN

The natural affinity of children for their father was acknowledged by this Court in Weber v. Aetna Casualty and Surety Co. 406 U.S. 164, 169 (1972) to be as great in the case of illegitimate as legitimate children. The routine disregard of the rights of unwed fathers in relation to the adoption of their children thus slights the interests of the children as well.

Not only do the children suffer the loss of a father they have loved and known, but the acquisition of a step father and adoptive status may well not compensate for the loss.

Studies of children whose parents separate or divorce show that the children value and want to continue their relationship with both

their parents.* Relationships between children and stepparents can be problematic.** - as readers of Cinderalla and Dickens' David Copperfield may recall. Finally child welfare and social work specialists, in response to lessons learned from movement of adoptees searching for their natural parents have begun to question the desirability of the complete rupture in relationships between natural parents and children which characterizes present adoption practice.

"Taking a child from one set of parents and placing him/her with another set, who pretend the child

*Kelly and Wallerstein, Part-Time Parent, Part-Time Child: Visiting After Divorce, Journal of Clinical Child Psychology, Vol. 6 No. 2, Summer 1977; Rosen, Children of Divorce, Vol. 6, No. 2, Summer 1977.

**Irene Fast and Albert C. Cain "The Stepparent Role: Potential for Disturbances in Family Functioning. American Journal of Orthopsychiatry, April 1966.

is born to them disrupts a basic natural process. The need to be connected with one's biological and historical past is an integral part of one's identity formation." *

DISCRIMINATION BETWEEN MARRIED OR DIVORCED FATHERS, UNWED MOTHERS AND UNWED FATHERS

Additionally, the disparate treatment pursuant to Domestic Relations Law §111, Subdivision 2 and 3 of married or divorced fathers as opposed to unwed fathers, and unwed mothers as opposed to unwed fathers, violates the Equal Protection Clause.

Pursuant to Domestic Relations Law §111, Subdivision 2,3 and 4, absent a showing of abandonment or other species of unfitness a child can't be adopted without the consent of its married or divorced father or unwed mother. In the same circumstances, the consent of the unwed father is not required. This difference in rights is substantial

*Sorosky, Baran, Pannor, The Adoption Triangle, p. 219, Anchor Doubleday, 1978.

"The right of active participation in presenting evidence and in making arguments with respect to the ultimate issue before the adoption court - the best interest of the child - is not at all the same. . . as requiring the consent of the father as a prerequisite to granting the adoption - in effect granting him not only a right of participation but a potential veto." (Dissenting Opinion) Malpica-Orsini, supra. 36 N.Y.S. 2d at 578.

Amicus believes that the previously presented discussion of state interest demonstrated that the treatment accorded to unwed fathers in relation to the adoption of their children by Domestic Relations Law §111 was not justified by any compelling or sufficiently important state interests. At the same time Appellant Caban's situation and that of an unmarried or divorced father, in relation to the adoption of his children by a third person, are essentially the same.

Parental rights and obligations of a legitimate and a putative father are virtually the same in the areas of custody, visitation

and support under New York law. In the case of a child of a marriage, the mother and father have an equal claim to custody and the non-custodial parent has the right of visitation, Domestic Relations Law §240; Hotze v. Hotze, 57 A.D. 2d 85, 394 N.Y.S. 2d 753 (1977). Domestic Relations Law §32 places primary responsibility for support on the father. See also F.C.A. §413. However, New York Courts are now viewing both legitimate mother and father as equally responsible for child support. Carter v. Carter, 58 App. Div. 2d 438, 398 N.Y.S. 2d 88 (App. Div. 2nd Dept. 1977); Tessler v. Siegel, 59 App. Div. 2d 846, 399 N.Y.S. 2d 218 (App. Div. 1st Dept. 1977). With respect to custody, New York Courts, long adhered to the rule that the mother has a superior right to custody of an illegitimate child as against the child's father. People ex rel Meredith v. Meredith,

272 App. Div. 79, 69 N.Y.S. 2d 462 (1947). More recent decisions reveal a trend toward deciding custody conflicts between unmarried parents as if the mother's and father's right to custody were equal. See Juan R. v. Necta V., 55 A.D. 2d 33, 389 N.Y.S. 2d 126 (App. Div. 1st Dept. 1976); Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S. 2d 636 (1966); Stone v. Chip, 68 Misc. 2d 134, 326 N.Y.S. 2d 520 (1971). The right to custody of both unwed mother and father is treated as superior to that of "strangers" Raysor v. Gabbey, 57 A.D. 2d 437, 359 N.Y.S. 2d 290 (1977); People ex rel Blake v. Charger, 76 Misc. 2d 577, 351 N.Y.S. 2d 322; Boatright v. Otero, __Misc. 2d__, 399 N.Y.S. 2d 391 (1977). Visitation rights of unwed fathers have been treated on a par with married fathers, Pierce v. Yerkovich, 80 Misc. 2d 613, 363 N.Y.S. 2d 463 (1974).

The putative father is also responsible for child support. F.C.A. §545. Where paternity has not been legally established, it will be determined as an incident of a proceeding for custody of visitation.

Functionally, the situation of unwed father Appellant Caban was also substantially similar to that of many married or divorced fathers. He provided a home for his children together with their mother, contributed to their support, spent workday, leisure and holiday times with them, going through the ordinary small routines of everyday family life and child rearing. After the mother of the children left him and took the children with her, he made sure to spend free weekend time with them: Unhappy when his children were taken to Puerto Rico he tried to regain their custody; then when the children were back with their mother he continued to see them every week.

In Quilloin v. Walcott, __U.S.__, 54 2d L. Ed 2d 511 (1978), the Court rejected the claim that the interests of the unwed father in relation to the adoption of his children were indistinguishable from those of a married father who is separated or divorced and no longer living with his child, because the unwed father there had not borne any responsibility for the care or support of the child. Here Appellant Caban, the unwed father had borne such responsibility and demonstrated his commitment to his children.

At the same time there are married or divorced fathers whose committment to their children is minimal. Some may separate from their wives before their child is born; others stay out every night. Where a married mother wants to surrender a child for adoption, the married father has had no opportunity to demonstrate his committment to the child. Yet Domestic Relations Law

§111, grants greater rights to such married fathers than to Appellant Caban. A married father may default in his support obligations as well as an unmarried father. With respect to neither are support obligations self-executing: Where support is not provided legal recourse must be had against both the once married and the unwed father. And even fathers who cannot provide support, provide children with psychological resources and a valuable network of family relationships.*

The discrimination between unwed fathers and unwed mothers pursuant to Domestic Relations Law §111 is equally arbitrary.

Just as "it is no less important for a child to be cared for by its parent when that parent is male rather than female," Weinberger v. Weisenfeld, 420 U.S. 636, 652 (1975), so

*Blaydon & Stack, Income Support Policies and the Family, Deadalus, Spring 1977, p. 147, p. 153-156.

the relationship between father and child, apart from custody, is no less important than the relationship between mother and child.

While some Courts have held that there was no necessary relationship between a parent's gender and suitability for custody of a child, People ex rel Watts v. Watts, __Misc. 2d__, 350 N.Y.S. 2d 285 (1973), the relationship between a parent's gender and the adoption decision is truly remote.

> The Statute here results in denial, without regard to the merits, of the natural right of the father, not because the welfare of the child demands it, nor because there is any question that he is a model father, but simply because he is the male, rather than the female parent." (Dissenting Opinion) Malpica-Orsini, supra, 36 N.Y.S. 2d at 591.

On the principles of Reed v. Reed, 404 U.S. 71 (1971), Frontiero v. Richardson, 411 U.S. 677 (1973), Weinberger v. Weisenfeld, 420 U.S. 636 (1975), Stanton v. Stanton 421 U.S. 7 (1975), Domestic Relations Law §111 should be struck down for impermissible discrimination on the basis of sex as well as marriage status.

CONCLUSION

For all of the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

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Respectfully submitted,

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